HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Petition No.3619 of 2001

Between:

K. Sujata

... Petitioner

And

The Government of Andhra Pradesh,
Rep. by its Secretary, Law (L) Department,
and others.

... Respondents

:: ORDER::

Counsel for the Petitioner: Sri D. Ramalingaswamy

Counsel for Respondents: Government Pleader for Home

December 27, 2006

Per G.S. Singhvi, CJ

This petition involves adjudication of the petitioner's challenge to

notification dated 1-6-1999 issued by the Chairman of Andhra Pradesh State Level Recruitment Board (hereinafter referred to as 'the Board') for recruitment of 17 Additional Public Prosecutors Grade-II.

The petitioner is a practicing advocate. She has questioned the impugned advertisement on the ground of violation of the provisions of the Constitution, which, according to her, postulates recruitment to the services and posts in connection with the affairs of the State through the agency of the Andhra Pradesh Public Service Commission (for short, 'the Commission'). In the affidavit filed by her, the petitioner has averred that as per the recommendations of the Law Commission, the Prosecutors are required to be placed under the direct control of the Department of Prosecution and, therefore, recruitment of Additional Public Prosecutors etc. must be made through the agency of the Commission and not any other agency like the Board. She has then pleaded that the proposed recruitment of Additional Public Prosecutors through the Board is liable to be annulled because it is intended to facilitate selection of the candidates as per the choice of the governmental functionaries.

In the counter-affidavit filed by Shri Jaspal Singh, Additional Director General of Police, Recruitment and Chairman of the Board, it has been averred that the proposed recruitment of Additional Public Prosecutors is in consonance with Rule 3 of the Andhra Pradesh Prosecution Service Rules, 1992 (for short, 'the 1992 Rules'). According to Shri Jaspal Singh, advertisement dated 1-6-1999 was issued in furtherance of communications dated 16-11-1998 and 4-12-1998 sent by the Finance and Planning Department. He has referred to the provisions of
Articles 315 to 320 of the Constitution and pleaded that in view of clause (3) of Article 320, exclusion of the posts of Additional Public Prosecutors from the purview of the Commission cannot be faulted. He has also questioned the locus standi of the petitioner to challenge advertisement dated 1-6-1999 by asserting that she has not even applied for the post. Shri Jaspal Singh has denied the allegations of mala fides and averred that in the past also the Board has made selection in 1992 and 1997, but no such objection was raised by anyone.

We have heard learned counsel for the parties and perused the record.

For deciding whether the impending recruitment of the Additional Public Prosecutors is ultra vires the provisions of the Constitution or Sections 24 and 25 of the Code of Criminal Procedure, 1973 (for short, 'CrPC'), it will be useful to notice the relevant constitutional and statutory provisions.

Constitutional Provisions:

Article 309, which falls in Chapter-I of Part XIV of the Constitution, lays down that subject to the provisions of the Constitution, acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. In terms of proviso to this Article, the President or such person as he may direct, can make rules regulating the recruitment, and the conditions of service of the persons appointed to the services and posts in connection with the affairs of the Union until provision in that behalf is made by or under an act of the Parliament. Similarly, the Governor of a State or such person as he may direct, can make rules regulating recruitment, and the conditions of service of persons appointed to the services and posts in connection with the affairs of the State. The rules framed under this proviso are effective till the appropriate Legislature enacts law on the subject.

Articles 315 to 323, which relate to Public Service Commissions, find place in Chapter II of Part XIV. Article 320 (1), (2) and (3), which regulate the functions of the Public Service Commissions, read as under:

> "**320. Functions of Public Service Commission:**
>
> (1) It shall be the duty of the Union and the State Public Service Commission to conduct examinations for appointment to the services of the Union and the services of the State respectively.
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> (2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.
>
> (3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted-
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> a) on all matters relating to methods of recruitment to civil services and for civil posts;
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> b) on the principles to be followed in making appointments to

civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, In a civil capacity, and any question as to the amount of any such award.

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted."

Sections 24 and 25 of CrPC.

Sections 24 and 25 of CrPC, which relate to appointment of Public Prosecutors and Additional Public Prosecutors in the High Court and Districts or local area and Assistant Public Prosecutors in the Courts of Magistrates, read as under:

"**24. Public Prosecutors:**

(1)For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal of other proceeding on behalf of the Central Government, as the case may

be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub- section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub-section (7) and sub-section (8), the period

during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]

25. Assistant Public Prosecutors:

1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the courts of Magistrates.

1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the courts of Magistrates.

2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in-charge of that case:

Provided that a police officer shall not be so appointed –

a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

b) if he is below the rank of Inspector."

Andhra Pradesh Prosecution Service Rules, 1992

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India read with Sections 24 and 25 of CrPC, the Governor of Andhra Pradesh made the 1992 Rules for the Andhra Pradesh State Prosecution Service. Rules 2 and 3 of the 1992 Rules, which provide for constitution of the service and method of appointment and have bearing on the decision of the writ petition, read as under:

"**2. Constitution:-**

The Service shall consist of the following categories of posts in the Andhra Pradesh State Prosecution Service.

Category-1: Director of Prosecutions

Category-2: Additional Director of Prosecutions

Category-3: Public Prosecutor/Joint Director of Prosecutions

Category-4: Additional Public Prosecutors Grade-I/ Deputy Director of Prosecutions

Category-5: Additional Public Prosecutors, Grade-II

Category-6: Senior Assistant Public Prosecutor

Category-7: Assistant Public Prosecutor

3. <u>Method of Appointment</u>:-

Subject to the other provisions in these rules, the method of appointment for the several categories shall be as follows:-

S.No.	Category (1)	Method of appointment (2)
1.	Director of Prosecutions	a) By promotion from the category of Additional Director of Prosecutions Category with a service of not less than 2 years. b) If no suitable candidate is available for promotion in the category of Additional Director by transfer or on deputation from the State Higher Judicial Service. OR c) By transfer or on deputation from the IPS cadre of the Andhra Pradesh an officer over and above the rank of Deputy Inspector General of Police possessing a Law Degree.
2.	Additional Director of Prosecutions	By promotion from the category of Public Prosecutor/Joint Director of Prosecutions, Category-3 with a service of not less than 2 years or by transfer or on deputation from Andhra Pradesh State Higher Judicial Service.
3.	Public Prosecutor/Joint Director of Prosecutions	By promotion from the category of Additional Public Prosecutor –Grade-I/Deputy Director of Prosecutions Category-4 with a service of not less than 2 years or by transfer or on deputation from the State Judicial Service of the cadre of Sub-Judges.
4.	Additional Public Prosecutor, Grade-I/Deputy Director of Prosecutions	By promotion from the category of Additional Public Prosecutor, Gr.II, Category-5 with a service of not less than 3 years or by transfer or on deputation from State Judicial Service of the Cadre of Munsif Magistrate.

5.	Additional Public Prosecutor, Grade-II	(i) 70% by promotion from the Category-6 Senior Assistant Public Prosecutor with a service of not less than 2 years. (ii) 30% by direct recruitment
6.	Senior Assistant Public Prosecutor	By promotion from the Category – Assistant Public Prosecutor with a service of not less than 2 years.
7.	Assistant Public Prosecutor	By direct recruitment.

Note:

a) 30% of the substantive vacancies in the category of Additional Public Prosecutor, Gr.II (Category-5) shall be filled by direct recruitment.

b) The remaining vacancies in the category of Additional Public Prosecutor, Grade-II shall be filled by promotion from the Category-6. If a suitable or qualified person in the category of Senior Assistant Public Prosecutor is not available, the said vacancies shall also be filled by direct recruitment or by contract.

c) The State Level Recruitment Board in Police Department shall from time to time hold the examination/selection for the candidates for appointment by direct recruitment."

Although the petitioner has not prayed for striking down the 1992 Rules, her counsel Shri D. Ramalingaswamy argued that the same are liable to be declared ultra vires the provisions of Article 320 of the Constitution and Sections 24 and 25 of CrPC because the posts enumerated in Rule 2 of the 1992 Rules have not been taken out of the purview of the Commission. He further argued that Note-C appearing below Rule 3 cannot be relied for justifying exclusion of the posts of Additional Public Prosecutors from the purview of the Commission because that exercise can be done only by making regulations under the proviso to

Article 320 (3) of the Constitution. Learned counsel emphasized that the Public Prosecutors represent the sovereign and, therefore, their recruitment through an agency of the police department is bound to affect the independence of the selected candidates.

Learned Government Pleader for Home relied on the non-obstante

clause contained in sub-section (6) of Section 24 CrPC and argued that the provision contained in Rule 3 for appointment of Additional Public Prosecutors Grade-I by promotion from the category of Additional Public Prosecutors Grade-II and of Additional Public Prosecutors Grade-II from amongst senior Assistant Public Prosecutors to the extent of 70% of the posts does not suffer from any constitutional infirmity. He laid considerable emphasis on the fact that the petitioner is not even a candidate for recruitment to the post of Additional Public Prosecutor Grade-II and argued that she is not entitled to question the vires of the 1992 Rules. Another argument of the learned Government Pleader is that even though Article 320 (3) does not, in terms, find a mention in the notification issued by the State Government for framing the 1992 Rules, the exclusion of the posts enumerated in Rule 3 of those Rules from the purview of the Commission should be read as implicit because the rule making authority has expressly assigned the function of recruitment to the Board.

We have given our most anxious consideration to the rival submissions. Undisputedly, the petitioner is not a candidate for recruitment to the post of Additional Public Prosecutor for which advertisement dated 1-6-1999 was issued by the Chairman of the Board. Therefore, her challenge to the impugned advertisement is required to be scrutinized with greater care and a lot of reservation more particularly because none of the candidates who appeared in the written examination held on 4-3-2001 has been impleaded as party to the writ petition and, on that account, none of them could get an opportunity to contest the writ petition.

The argument of Shri D. Ramalingaswamy that the proposed recruitment of Additional Public Prosecutors Grade-II through the Board is ultra vires the Constitution and Sections 24 and 25 of CrPC sounds attractive but lacks merit. No doubt, by virtue of clause (3) of Article 320, the Commission is required to be consulted on all matters relating to methods of recruitment to Civil Services and posts and in making promotions and transfers from one service to another, by virtue of proviso to this clause, the Governor can make regulations and exclude any of the matters specified in clauses (a) to (e) from the purview of the Commission. The 1992 Rules, which

regulate appointment of various posts specified in Rule 3, have been framed by the Governor of the State in exercise of the powers conferred upon him by proviso to Article 309 of the Constitution of India read with Sections 24 and 25 of CrPC. These rules provide for direct recruitment to the cadres of Assistant Public Prosecutor (100%) and Additional Public Prosecutor Grade-II (up to the extent of 30%) through the agency of the Board. With the framing of these rules, the posts specified therein will be deemed to have been taken out of the purview of the Commission and non-mention of proviso to Article 309 (3) in the notification issued for promulgation of the 1992 Rules is inconsequential.

Section 24 (4) envisages that the District Magistrate shall, in consultation with the District and Sessions Judge, prepare a panel of the names of persons who are considered fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district. Sub-section (5), which is couched in negative form, declares that no person shall be appointed by the State Government as Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel prepared under sub-section (4). However, the prohibition contained in sub-section (5) is subject to the non-obstante clause contained in sub-section (6), which lay down that if there exist a cadre of prosecuting officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre. Proviso to this section enables the State Government to revert to the panel prepared under sub-section (4) if suitable person is not available in the cadre of prosecuting officers.

In the case before us, there exists a regular cadre of prosecuting officers. It comprises of the posts of Director of Prosecutions, Additional Director of Prosecutions, Public Prosecutors/Joint Director of Prosecutions, Additional Public Prosecutors Grade-I/Deputy Director of Prosecutions, Additional Public Prosecutors Grade-II, Senior Assistant Public Prosecutor and Assistant Public Prosecutor. Rule 3 of the 1992 Rules specifies the method of appointment to various posts specified in Rule 2. Therefore, the State Government is bound to appoint public Prosecutor and Additional Public Prosecutor only from among the persons who fulfill the eligibility criteria. By virtue of Note-C appearing below Rule 3 of the 1992 Rules, the Board is

empowered to hold examination and select candidates for appointment by direct recruitment. Since this note forms integral part of the scheme of recruitment prescribed by the rules framed under proviso to Article 309 of the Constitution, no exception can be taken to the holding of examination and making of selection by the Board for recruitment to the posts of Assistant Public Prosecutors and Additional Public Prosecutors Grade-II.

The petitioner's plea that the independence of the Public Prosecutors will get compromised if they are recruited through the Board, which works under the control of the police department, is based on a wholly unfounded assumption that the Board will make recommendation otherwise than on merit. In our considered view, the bald allegations made by the petitioner cannot justify a dubious assumption that the Court may necessarily be influenced by extraneous factors.

No other point has been argued.

As a corollary to the above discussion, we hold that the impugned advertisement does not suffer from any constitutional or legal infirmity and the writ petition is liable to be dismissed. Ordered accordingly.

G.S. SINGHVI, CJ

C.V. NAGARJUNA REDDY, J

December 27, 2006

svs